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SENTENCE

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

13 Cr. 641 CS

5 STEPHEN CANNELLA,

6 Defendant.

7 -----x

8 December 5, 2013

9 4:10 p.m.

White Plains, N.Y.

10 Before:

11 HON. CATHY SEIBEL,

12 District Judge

13 APPEARANCES

14 PREET BHARARA

15 United States Attorney for the
Southern District of New York

16 ILAN GRAFF

Assistant United States Attorney

17 FEDERAL DEFENDERS UNIT

Attorney for Defendant

18 JASON SER

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1 THE COURTROOM DEPUTY: United States v. Stephen
2 Cannella.

3 MR. GRAFF: Ilan Graff for the government.

4 MR. SER: Jason Ser, Federal Defenders, for
5 Mr. Cannella.

6 THE COURT: Good afternoon. Have a seat, everyone.
7 Good afternoon Mr. Graff, Mr. Ser, Mr. Cannella.

8 MR. SER: Good afternoon, Judge.

9 THE COURT: Let me start by putting on the record what
10 I've received in connection with the sentencing. I have the
11 presentence report dated November 22nd. I have Mr. Ser's
12 sentencing memorandum with exhibits dated December 3rd. And I
13 have a letter from Dr. Murray dated December 4th. Is that
14 everything I should have?

15 MR. GRAFF: Yes, your Honor.

16 MR. SER: Yes, your Honor.

17 THE COURT: All right. Mr. Cannella, have you read
18 the presentence report and the addendum?

19 THE DEFENDANT: Yes.

20 THE COURT: Have you discussed them with Mr. Ser?

21 THE DEFENDANT: Yes.

22 THE COURT: Mr. Ser, you've read the presentence
23 report and the addendum and discussed them with your client?

24 MR. SER: Yes, your Honor.

25 THE COURT: Do you have objections to the factual

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1 recitation in the presentence report?

2 MR. SER: No, your Honor.

3 THE COURT: Does the government have any objections to
4 the factual recitation in the presentence report?

5 MR. GRAFF: No, your Honor.

6 THE COURT: So the findings of fact in the presentence
7 report are my findings of fact. Before I hear you both, let me
8 just ask a question about something that confused me. The
9 presentence report in describing the offense conduct describes
10 an undercover, I don't know if it was an agent, but an
11 undercover person working with the FBI going onto the
12 peer-to-peer file-sharing program, connecting with defendant,
13 and observing that he was sharing more than 7600 files.

14 Then, Mr. Ser's memo, which makes what I think are
15 some valid arguments about why I should believe his client that
16 he was trying to get rid of this stuff, discusses 47 videos
17 that were deleted and a bunch of stuff that was found, hundreds
18 of files that were found in cache files and some that were in
19 unallocated space. I guess what I'm trying to figure out, if
20 there were 7600 on April 17, 2012 and when the agents went and
21 did the search -- the date of which I don't have in front of
22 me -- on August 1, 2012, where had all the 7600 gone? How many
23 were left?

24 MR. GRAFF: Your Honor, I believe I'm in a better
25 position to speak to that particular question than Mr. Ser,

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1 although he is certainly free to disagree. I believe that the
2 pertinent number of files here is what appears in paragraph 13,
3 that is, the 1282 images and 82 videos that were actually
4 recovered from the computer. The earlier number, the 7600
5 number, that's a discrepancy that I have discussed with one of
6 the agents in the case. My understanding of what the 7600
7 represents is the total number of files that were being shared
8 by Mr. Cannella rather than the total number of files
9 containing child pornography. That is, some number of those
10 files that were being shared might have contained other things.

11 THE COURT: Okay. So it could be movies, music,
12 whatever.

13 MR. GRAFF: That is my best understanding of the
14 discrepancy. But I believe for our purposes here, what is
15 relevant are the materials found on the computer.

16 THE COURT: The 1282 images and the 82 videos, of
17 those how many were, I understand they're all recoverable, how
18 many of them does it appear that Mr. Cannella had deleted or
19 not downloaded, wasn't saving is what I'm asking.

20 MR. GRAFF: I have no disagreement with the factual
21 recitation in Mr. Ser's memo, that is, I forget the precise
22 number that he adduced, but there are numbers that I've
23 discussed with reference to this case, and we do not disagree
24 with his assessment as to how many were moved to the trash
25 file, how many were in cache files. These are all files that

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1 were present on the computer, not necessarily files at the
2 moment that the computer was searched in some kind of saved
3 folder.

4 THE COURT: And are either of you in a position to
5 tell me, out of the 1282, 200 were saved and a thousand were in
6 these sort of secondary spaces or half were in secondary spaces
7 and half were saved?

8 MR. SER: I think I indicated in one paragraph with
9 regard to the line wire there were four complete files being
10 shared and there were 28 incomplete files in the line wire
11 program. And then my recollection is a very large majority
12 were cache files. This isn't the kind of case where we have
13 any kind of systemic filing system, where we have folders.

14 MR. GRAFF: I don't have reason to doubt what Mr. Ser
15 is saying. And I'm happy to sort of look for a more specific
16 answer to the extent that, to the extent that it's helpful to
17 your Honor. The only point that I would emphasize is that in
18 addition to the certainly large number of files that were in
19 cache files, there was also a significant number that were
20 neither shared nor in cache files, but were saved on the
21 computer. Now, I realize "a significant number" is a bit
22 vague, and I unfortunately can't be more specific, but it was
23 not that there was a vanishingly number of files that were
24 accessible and everything else was a product of browsing.

25 THE COURT: All right. That's helpful.

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1 I have one more question for you, Mr.~Graff, and that
2 question relates to the time Mr. Cannella's already done and
3 been in for and how much of it, if any, is going to be credited
4 to his state sentence and how much of it is going to be
5 credited to his federal sentence. What can you tell me on that
6 subject?

7 MR. GRAFF: I've spoken to a representative of the
8 Bureau of Prisons and my best understanding is that from the
9 moment -- first of all, that the time he did prior to making
10 bail, of course, would be counted towards his federal sentence.
11 And in addition, that the time since his bond was exonerated
12 here and he was remanded federally should also be counted
13 toward his federal time. The time that he did when he was, the
14 time that he did before that occurred, that is when he was
15 initially remanded in the state, which was about three weeks,
16 22 days. It is unclear exactly how that would be treated with
17 respect to a federal sentence. That is, on the one hand the
18 underlying conduct is clearly the same conduct as in the
19 federal case. On the other hand, committing that conduct while
20 on state probation is arguably a totally separate offense.

21 THE COURT: The federal bond was exonerated on October
22 17 according to Mr. Ser's letter. I'm at the bottom of page 9.

23 MR. GRAFF: In that case, your Honor, it would be the
24 period of time from October 8 to October 17th. That would be
25 in that dubious space. From October 17th forward would

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1 presumably be counted toward the federal sentence.

2 THE COURT: Okay. You can correct me if I'm wrong on
3 this, Mr. Ser, all of the time that Mr. Cannella has done so
4 far will be credited to his federal sentence with the possible
5 exception of October 8th to October 17th, do I have that right?

6 MR. SER: What happened was, we have the eight days
7 prerelease on bond and then October 8th he goes into state
8 court. I filed for exoneration of bond and remand order which
9 Judge Smith granted. Kerry Lawrence was on the state side of
10 the case and he had the state judge release Mr. Cannella on his
11 own recognizance which effectively triggered his federal
12 custody time to begin accruing. The notice I had was October
13 30th was the date it began accruing. So the time between the
14 8th and the 30th was the state time, the 22 days.

15 THE COURT: Even though the federal bond was
16 exonerated on the 17th, it wasn't until the 30th that the state
17 judge --

18 MR. SER: -- released him on his own recognizance.
19 And then Mr. Lawrence went back and I believe the judge
20 rescinded the release on his own recognizance order and by then
21 Mr. Cannella was a federal ward.

22 THE COURT: So there's 22 days that the Bureau of
23 Prisons may or may not give credit for.

24 MR. GRAFF: I may have provided misinformation to the
25 Bureau of Prisons to the extent that I communicated to them

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1 that the date of the exoneration of the federal bond was the
2 date that he was then remanded to federal custody. I presented
3 that to them in error. It may be that it was the 22 days
4 rather than the 9 days.

5 THE COURT: It wasn't until the state judge said I
6 wash my hands. Mr. Cannella had retained counsel in the state
7 case?

8 MR. SER: His father retained Mr. Lawrence only for
9 the probation proceeding, and he actually had a state-appointed
10 18B Panel attorney literally up until a week before the release
11 on his own recognizance occurred.

12 THE COURT: I shouldn't be concerned that Mr. Cannella
13 has some money stashed away somewhere that he should be giving
14 to the government for your services?

15 MR. SER: No, your Honor.

16 THE COURT: Does the government wish to be heard?

17 MR. GRAFF: I have no reason to doubt any of the
18 factual recitations in Mr. Ser's memo, at least as they pertain
19 to this defendant's individual circumstances and history, nor
20 do I have any, nor does the government have any cause to
21 quibble with the factual representations in the presentence
22 report.

23 I want to speak briefly about a few facts that are
24 given less prominent placement in Mr. Ser's memorandum. Before
25 I do so, I did want to speak to the inconsistency between the

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1 guidelines range contemplated by the plea agreement and the
2 guidelines range in the presentence report. The difference in
3 the range as explained in the presentence report is entirely
4 attributable to the four-point enhancement that under 5 -- is
5 attributable to the --

6 THE COURT: Sadistic and masochistic.

7 MR. GRAFF: There you go, your Honor. The government
8 doesn't disagree that that enhancement would properly be
9 applied here. I say only that with respect to the government's
10 position on this defendant's sentence, we honor our commitment
11 in the plea agreement with respect to the stipulated guidelines
12 range. I note only with respect to balancing this defendant
13 against other similarly situated defendants and trying to craft
14 an appropriate sentence, this was a defendant who had a
15 previous criminal conviction at the time of the offense
16 conduct. He was on probation, that is, on notice that behaving
17 lawfully was of utmost importance. There were a large number
18 of images at issue here. Certainly no disagreement over a
19 thousand. And at least some fraction of those were made
20 available to others. There were also images that included
21 prepubescent minors which factors into the guidelines
22 calculation and those are prepubescent minors and other people
23 who were revictimized by the offense conduct here.

24 To the extent that there are other factors adduced by
25 defense counsel in his sentencing memorandum that are

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1 appropriate for your Honor's consideration, I note only that
2 some of those have already been, for want of a better term,
3 priced into the guidelines calculation here. That is, the
4 defendant was originally charged by complaint with both
5 possession and distribution, and after conferring -- I think
6 it's clear to the Court how a distribution charge might arise
7 from the facts set forth in the presentence report. After
8 conversation with Mr. Ser and discussion of some of the factors
9 that are now before the Court with respect to the defendant's
10 sentencing, the government agreed to allow the defendant to
11 plead strictly to the possession charge which not only removes
12 the mandatory minimum in this case but also removes additional
13 enhancements that might have further increased the guidelines
14 range. I offer that only as additional factors for your Honor
15 to consider with respect to the sentence here. The government
16 submits that a guideline sentence is reasonable and stands by
17 the stipulated guideline sentence contemplated by the plea
18 agreement.

19 THE COURT: Which is 57 to 71.

20 MR. GRAFF: Yes, your Honor.

21 THE COURT: Mr. Ser.

22 MR. SER: I always preface what I'm about to say by
23 saying I'm trying not to reiterate what is in my lengthy
24 sentencing letter and I thank the Court for being so
25 understanding and taking it this week.

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1 THE COURT: Luckily, I had a two-day hearing scheduled
2 and it went away at the last minute, so I had some time on my
3 hands yesterday to read your voluminous submission. But I did
4 read it all.

5 MR. SER: I appreciate that. My one-man show has
6 really cut into my time.

7 THE COURT: I feel your pain.

8 MR. SER: I wanted to start off by noting to the Court
9 that everyone sitting to your Honor's left is Mr. Cannella's
10 family. They all came to court and are showing amazing support
11 for him. Including his mom, who as I indicated, has been among
12 the most involved parents I've had in any case for a very long
13 time. I spent a considerable time with his father. His
14 stepmother, stepsiblings, cousins, grandmother, everyone has
15 come out of the woodworks for Mr. Cannella. Calling me,
16 writing letters, and their showing up here today in support of
17 Mr. Cannella. So I wanted to thank them for coming in.

18 I've gone on *ad nauseam* about the faults with 2G2.2,
19 and I'm not going to get into that. I'm sure your Honor has
20 heard them over and over again and read numerous decisions and
21 seen God knows what else debating the issue. I do think we
22 have such out-of-the-ordinary facts here with such an
23 out-of-the-ordinary defendant that would call for mitigation,
24 in addition to whatever issues the guidelines might have that
25 support my request. I might go so far as to say even if the

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1 2G2.2 guidelines weren't so fraught with problems that the
2 equities we have in Mr. Cannella's background certainly would
3 be strong enough, come very close to being strong on their own
4 enough to support my request.

5 I'm asking the Court to sentence him in one of two
6 ways. I think in the end, a year of custody is appropriate.
7 And that would be year of home confinement. Whether the Court
8 includes that one year home confinement as a condition of
9 supervised release or as part of a two-year sentence which is
10 split, which the Court is legally entitled to do, I think that
11 is sufficient but not greater than necessary to satisfy the
12 parsimony provision in 3553(a) in this case.

13 Mr. Cannella is an young man who has been plagued with
14 health issues his entire life. They continue to this day.
15 I've spoken with him many times while he's been at Westchester
16 County Jail. There have been difficulties getting him the
17 medication he needs. His body is starting to feel the
18 repercussions of not being able to regularly medicate and the
19 sarcoidosis is flaring up. Simply stated, his health is
20 suffering. And I do believe a prolonged sentence would make
21 that even worse for him. We documented his health with the
22 exhibits attached in my letter.

23 The reports I submitted from Dr. Lau -- Mr. Lau, he's
24 not a doctor actually, Dr. Prentky and Dr. Murray were all
25 positive. And on the psychological side of the health coin,

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1 all three seemed to be in agreement that Mr. Cannella is not a
2 danger to the community, he is not a pedophile. Dr. Prentky
3 conducted Able Testing which is what the probation officer,
4 Stephanie Dunne, recommended be performed in her report. And
5 we did that.

6 And according to Dr. Prentky, who is active in the
7 courts around here and very involved in child pornography
8 cases, he's indicated that the Able Testing has not revealed
9 anything that would suggest Mr. Cannella's a danger. He's not
10 a pedophile. And there is nothing to indicate, I believe
11 Mr. Lau agreed with this, that he's at any risk of reaching out
12 and committing any sort of hands-on offense.

13 So even assuming there to be some credit to the
14 slippery slope argument that comes up in child porn that
15 possession or receipt and distribution could lead into more
16 extensive or extreme conduct, I think that's belied by the
17 findings not only of someone that the defense retained but
18 Mr. Lau who is someone that Pretrial Services regularly uses.
19 And Dr. Murray actually was a therapist that Mr. Cannella
20 sought out and began seeing on his own literally a day after
21 the seizure occurred and before he ever was charged with a
22 crime. He's been in contact with me and his letter clearly
23 provides wonderful insight into Dr. Cannella's willingness to
24 go for treatment and therapy. He makes the trip up from White
25 Plains where his mother lives up to where Dr. Murray lives in

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1 Fishkill. He travels up there every weekend to be able to
2 attend counsel. He never missed. He never had a problem. He
3 was always involved, responsive as he was during Mr. Lau's
4 neurological exam and Dr. Prentky's.

5 So the results in those examinations are positive and
6 bode well and paint a picture of someone who is so different
7 than what the conduct paints. How we end up finding ourselves
8 sitting with Mr. Cannella in the courtroom, although I didn't
9 touch on it in great detail in my own writing, Dr. Prentky,
10 Mr. Lau and Dr. Murray touch on it, Mr. Cannella was victimized
11 when he was a child. An uncle of his had taken photos of him
12 and touched him inappropriately on more than one occasion.

13 Mr. Cannella is not making excuses. He told Dr.
14 Prentky. He's not saying what he did was because of that. He
15 doesn't even want to fathom how much it might have influenced
16 his decision originally when he began looking at these
17 materials. But to his credit that's never been an excuse.
18 That's something that happened. He doesn't hazard a guess as
19 to how much it might have affected him, but he assumes full
20 responsibility for what he's done. He doesn't expect that to
21 carry the day. But I think that it's a factor that can't go
22 unnoticed here. Certainly in the physicians' reports,
23 Mr. Lau's report, this is something that has to be dealt with
24 by Mr. Cannella. He has to get treatment and therapy, not only
25 to deal with the possession issue, but to resolve that part of

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1 his own personal history that affects so many other parts of
2 his life and his family's life now at this point.

3 So what's paramount in this case? There are so many
4 different things I could point out under 3553(a) but the one
5 thing I wanted to urge to the Court when I spoke was need of
6 treatment. A year of custody for Mr. Cannella will be
7 significant. He's never done more than five days. This is 48
8 times longer than the five days he had done on the probation
9 case. It's going to be a long period of time for him. This
10 isn't a year and a day, this is a full year that he will do. A
11 year of home detention will be an imposition upon him. It's
12 not going to be easy. At least one district court I cited
13 noted that it is punitive. There are onerous conditions that
14 can be imposed and should be imposed, so it's not just a jaunt
15 for him and he doesn't look at it that way.

16 But these requests I think will get him sooner than
17 later to where he needs to be. And that's in a room with a
18 psychologist, with a counselor, with some sort of treatment
19 provider. And of course, we can all look and say, well, we
20 provide that sort of counseling or treatment in custody. He's
21 going to go into custody, serve some sort of term, he can get
22 that when he goes to the FCI or a medical center. But
23 Dr. Murray and even Dr. Prentky touch on the fact that the
24 counseling needed here is a bit different and we want it to be
25 successful. And according to these doctors, and Mr. Lau might

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1 touch on it, I don't want to say he did, but I recall it
2 vaguely, it's important to have family involved with the
3 therapy and the treatment and the counseling. That can't
4 happen when he's in custody. It just can't. The parents
5 aren't going to be allowed to go to the facility, much less be
6 able to travel to the facility, because they work. Having the
7 family around according to Dr. Murray is important because it
8 assists in him opening up about it with his family and them
9 understanding what they need to do to help.

10 But his family has issues and they all need to work
11 through those things together. Dr. Murray also touches on the
12 fact that you need a stable environment, one that's going to
13 encourage Mr. Cannella to be open, want to talk about it. I
14 can't imagine a more difficult atmosphere to want to talk about
15 things like this than when you're in custody. Even if you're
16 with other inmates who are in like situations where they talk
17 about it too. You don't know who is going to say something.
18 You don't know who is going to talk about what Mr. Cannella
19 might have said. And being in a custodial setting and being so
20 forthcoming about something that could get you hurt, tormented
21 in custody, isn't something that Dr. Murray thought would be
22 best for Mr. Cannella. But putting him in a position where he
23 could be free to talk without repercussion is what he's urging.

24 I think home confinement allows your Honor to craft a
25 sentence that would serve all the purposes of 3553. It will

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1 get Mr. Cannella to where he needs to go so he can become a
2 better person. He's already proven that he is willing, able
3 and wants to get this treatment. He's a young man with a lot
4 of potential. He has a decent work history. He was doing
5 construction. He's a union worker. Creative thinker.

6 Dr. Prentky's report is a little out of the ordinary
7 in its structure and it's a lot of quotes taken right from
8 Mr. Cannella. And they strike me in certain places as he's a
9 very forthcoming kid, and acknowledged what he did was dumb.
10 Dr. Prentky called the trait adolescence. So I think with age
11 comes wisdom and hopefully that's where Mr. Cannella will get
12 to. We want to give him the tools he can utilize. I think
13 counseling and treatment is what he needs and he needs his
14 family to be around to support him.

15 Yes, he's Category II. I haven't asked for anything
16 other than a Category II stipulated guidelines range because
17 that's what the plea agreement says. Another dumb act. He was
18 driving a car and dropped his friends off. But it was a
19 five-day term of custody with probation. And he knows there's
20 going to be a price to pay in the state court as well. It's
21 unclear what the state will do. Of course I know what I want
22 them to do but whether that happens is another story. But I
23 think a year of custody in this case is sufficient given the
24 facts and given the difference between this case and a more
25 serious case.

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1 We have a limited number of files in this case. We
2 don't have the tens of thousands we would usually see. We
3 don't have the aggravating factors that commonly are associated
4 with defendants in Mr. Cannella's position. We don't have any
5 history of convictions for sexual abuse. We have no priors
6 related to any conduct like this. No foreign convictions in
7 Canada to something like this. He hasn't been deemed to be a
8 pedophile. He hasn't been termed to have any sort of traits
9 that render him a danger to the community. There are a host of
10 aggravating factors within the district, as I'm sure that your
11 Honor has seen, that make cases like this more problematic, and
12 crafting this sentence accounts for the differences between
13 those cases this case. I think it's warranted if there is any
14 disparity based on the facts. As I indicated, I think the
15 Court's in good company if the Court chooses to vary and impose
16 the sentence I'm asking for. A lot of the courts, 70 percent,
17 think in this particular context, possession of child
18 pornography, the guidelines are too high. This isn't a walk.
19 This isn't probation. A year of custody is difficult. Every
20 day will be for him. I believe this is a severe enough
21 sentence that it falls right where it should under the 3553(a).

22 THE COURT: Mr. Cannella, I'll hear you now if there's
23 anything you'd like to say before I sentence you.

24 THE DEFENDANT: I just want to say that I'm terribly
25 sorry and I feel really bad about the revictimization from all

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1 the files that were on my computer. I know what it's like to
2 know that someone is out there potentially looking at your own
3 pictures. And it sickens me to know that I participated in
4 that. I'm deeply regretful for that.

5 I also want to apologize to my family. My family
6 stood by me, is here today. My friends. Everyone who didn't,
7 you know, disown me. And I appreciate the support from them.

8 And I would also like to thank you for taking the time
9 to read over everything and weighing all factors for my
10 sentencing. And I appreciate your consideration plus
11 everything that Mr. Ser just said.

12 THE COURT: Thank you, Mr. Cannella.

13 I have to start with the sentencing guidelines, the
14 much maligned 2G2.2. Base offense level is 18. Two levels are
15 added because the material involved prepubescent minors. Four
16 levels are added because some of the materials portrayed
17 sadistic or masochistic conduct or other depictions of
18 violence. Two levels are added for the use of the computer.
19 Five levels are added for the number of images. That takes us
20 to offense level 31. This defendant gets three levels off for
21 his timely plea. That puts him at level 28. He's in Criminal
22 History Category II arising from the fact that he has a
23 conviction for aiding and abetting a burglary in 2008 and was
24 on probation for that offense at the time of this one. So one
25 point for the conviction, two points for committing this

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1 offense while on probation. That's a total of three criminal
2 history points and Criminal History Category II. The range is
3 87 to 108 months. The parties plea agreement referred to 57 to
4 71 months because they forgot about the four-level enhancement.
5 I don't know how both of these experienced lawyers missed it,
6 but it certainly jumped out at me when I saw the presentence
7 report, and it obviously jumped out at the presentence report
8 writer.

9 I recognize that a number of these enhancements,
10 certainly the computer one and perhaps the S&M one and the
11 prepubescent minors one, are going to be present in every case.
12 And I do agree that the guideline is not deserving of the
13 deference that judges usually pay to the guidelines, and by
14 deference I don't mean that they're bound by them, but they do
15 consider them a starting point, and in most cases they are the
16 result of some empirical methodology. This guideline isn't the
17 result of the usual process that the Commission undertakes.

18 On the other hand, it does reflect something that I
19 take seriously and that is it reflects Congress' and by
20 extension society's revulsion at this kind of conduct. I'm not
21 going to embarrass all of us by putting on the record any
22 details about what was in these images. It would suffice to
23 say that they're horrific. And I can understand why somebody
24 in Congress would think that anybody who gets any sort of
25 pleasure from looking at that sort of stuff is a dangerous

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1 individual, because most of us looking at that stuff are just
2 completely repulsed by it.

3 All that said, I don't think Mr. Cannella fits the
4 profile I so often see here for the reasons Mr. Ser has pointed
5 out. I sentence a lot of people for this offense, more than
6 you think, and often times I'm extremely nervous if I show them
7 any leniency they're going to at least go back and do it again
8 and maybe hurt somebody. I don't have any concern that
9 Mr. Cannella is going to hurt somebody. And I have high hopes
10 that he won't do it again because I think his attitude is much
11 better than what I often see.

12 So addressing myself to the 3553(a) factors. I've
13 already talked about the nature and circumstances of the
14 offense. This stuff is just horrifying and to be able to want
15 to look at it is -- it's hard for me to understand. And I'm
16 glad to see that Mr. Cannella understands it's not a victimless
17 crime and that the kids depicted in these photographs are
18 victimized every single day when somebody looks at them, and
19 that he contributed to that and that he and people like him who
20 trade these things on the Internet are creating a market for
21 images that can only be made through committing the most
22 revolting sorts of crimes against children. So it's a very
23 serious offense.

24 I do recognize that there's no indication whatsoever
25 that Mr. Cannella has ever presented a danger to any child and

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1 I don't think he is a danger to any child physically.

2 It's to his credit that unlike some of the collectors
3 or connoisseurs of this material that we see where they save
4 every last bit of it and file it and cross-reference it and
5 treat it lovingly like a stamp collection, Mr. Cannella, it
6 seems, at least as to some of the images, browsed them but
7 didn't save them, and others he affirmatively deleted, although
8 not all of them. But those are factors that also bode better
9 for him than for most child porn defendants that I sentence.

10 His history and characteristics cuts both ways. He's
11 obviously a very bright person. I can tell from the way he
12 spoke today and from some of the letters his family members
13 wrote about how he should be on Jeopardy and how he knows so
14 much about so many things. And yet he was, I guess a polite
15 way for me to say it is he was an indifferent student. And his
16 working history, although he did join the union, he doesn't
17 seem to have been working full-time, which may not be his
18 fault, the work may not have been there. But the last couple
19 of years he's basically playing a lot of poker and being
20 supported by his parents and not making anything of himself.
21 And that is a shame for a person who clearly has the gray
22 matter to make something of his life.

23 And he was on probation when he did this. I don't
24 think the offense for which he was on probation is so horrible.
25 It probably falls in the category of knuckle-headed, to use

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1 Mr. Cannella's words. But when you're on probation you got to
2 take extra steps to toe the line, and Mr. Cannella did not do
3 that.

4 Also on the plus side besides his obvious intelligence
5 is the family support that he has and the fact that he's been
6 receptive to therapy. I often see defendants who are charged
7 with this crime who are resistant and make excuses and
8 rationalize. And it doesn't appear that Mr. Cannella is doing
9 that. So I have some hope that the therapy is actually going
10 to be helpful for him.

11 Those first two factors relate to the defendant and
12 the case specifically. The next set of factors relates to sort
13 of society at large. The need for the sentence imposed to
14 reflect the seriousness of the offense, promote respect for the
15 law, provide just punishment, afford adequate deterrence, and
16 protect the public. I think most of those don't counsel for a
17 lengthy sentence here. Perhaps the only one that does is the
18 need to provide just punishment, a punishment that society will
19 recognize as fitting the crime. Treatment is a factor in this
20 case. I agree that treatment is more likely to be effective on
21 the outside than the inside. If that were the only factor that
22 would make my job easy. But of course that's not the only
23 factor.

24 I've considered all the 3553(a) factors, even the ones
25 that I haven't discussed, and essentially for the reasons set

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1 forth by Mr. Ser in his sentencing memorandum -- which is
2 excellent and should be Exhibit A when I have defendants who
3 have Federal Defenders and then they scrape together the
4 family's last two dollars to go hire a private lawyer not half
5 as good -- but essentially for the reasons stated by Mr. Ser, I
6 intend to sentence substantially below the sentencing guideline
7 range, and even substantially below the range that the parties
8 have stipulated.

9 I'm going to impose a sentence of 24 months
10 imprisonment. That's going to be followed by seven years of
11 supervised release on the following conditions. First, the
12 mandatory conditions. The defendant shall not commit another
13 federal, state or local crime. The defendant shall not
14 illegally possess a controlled substance. The defendant shall
15 not possess a firearm or destructive device. The defendant
16 shall cooperate in the collection of DNA as directed by the
17 probation officer. The defendant shall register with the state
18 sex offender registration agency in any state where the
19 defendant resides, is employed, carries on a vocation, or is a
20 student, and shall provide proof of registration to the
21 probation officer.

22 I'm going to suspend the mandatory drug -- hold on a
23 second. Maybe not. I'm not going to impose a special
24 condition. I'm going to impose the standard condition with
25 respect to drug-testing which is, if I remember, the defendant

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1 shall submit to one drug test within 15 days of release on
2 supervision and at least two unscheduled drug tests thereafter.
3 Defendant smoked an awful lot of weed in his teens up until
4 2007, but he has been on state probation since that time and I
5 assume if he had been continuing there would have been a
6 violation before this. So I don't see the need for drug
7 treatment. So I'm also imposing the normal mandatory
8 drug-testing condition.

9 I'm imposing the standard conditions of supervision
10 1-13 along with the following special conditions. The
11 defendant shall undergo a sex offense specific evaluation and
12 participate in a sex offender treatment and/or mental health
13 treatment program approved by the probation officer. The
14 defendant shall abide by all rules, requirements and conditions
15 of the sex offender treatment program, including submission to
16 polygraph testing. The defendant shall waive his right of
17 confidentiality in any records for mental health assessment and
18 treatment imposed as a consequence of this judgment to allow
19 the probation officer to review the defendant's course of
20 treatment and progress with the treatment provider. The
21 defendant will be required to contribute to the cost of
22 services rendered in an amount approved by the probation
23 officer based on ability to pay are availability of third-party
24 payment.

25 The defendant shall not have deliberate contact with

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1 any child under 18 years of age unless approved by the
2 Probation Department. The defendant shall not loiter within
3 100 feet of schoolyards, playgrounds, arcades or other places
4 primarily used by children under the age of 18.

5 The defendant shall participate in the
6 computer/Internet monitoring program administered by the U.S.
7 Probation Office. The defendant must provide the Probation
8 Office with advanced notification of any computers, automated
9 services, or connected devices, including smart phones, that
10 will be used during the term of supervision and that can access
11 the Internet. The probation officer is authorized to install
12 any application as necessary to survey all activity on
13 computers or connected devices owned or operated by the
14 defendant. The defendant may be required to pay the cost of
15 monitoring services at the monthly rate provided by the
16 Probation Office, which rates and the payment schedule for
17 which are subject to periodic adjustments by the Probation
18 Office.

19 The Probation Office will be notified by electronic
20 transmission of impermissible or suspicious activity or
21 communications occurring on such computer or connected device
22 consistent with the computer monitoring policy in effect by the
23 Probation Office. As triggered by impermissible or suspicious
24 activity, the defendant shall consent to and cooperate with
25 unannounced examinations of any computer equipment owned or

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1 used by the defendant. This examination shall include but it
2 is not limited to retrieval and copying of all data from the
3 computers, connected devices, storage media, and any internal
4 or external peripherals, and may involve removal of such
5 equipment for the purpose of conducting a more thorough
6 inspection. The defendant shall submit his person and any
7 property, house, residence, vehicle, papers, computer, other
8 electronic communication or data storage devices or media and
9 effects to search at any time with or without a warrant by any
10 law enforcement or probation officer with reasonable suspicion
11 concerning a violation of a condition of probation or super,
12 excuse me, condition of supervised release or unlawful conduct
13 by the person, and by any probation officer in the lawful
14 discharge of the officer's supervision function.

15 The defendant is to report to the nearest Probation
16 Office within 72 hours of release from custody. I recommend he
17 be supervised by his district of residence.

18 I'm imposing the mandatory one hundred dollar special
19 assessment which is due immediately.

20 I'm not going to impose a fine having considered the
21 factors in 18 U.S. Code 3572 because I don't believe the
22 defendant has the ability to pay.

23 Does either lawyer know of any legal reason why the
24 sentence I've described should not be imposed?

25 MR. SER: No, your Honor.

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1 MR. GRAFF: No, your Honor.

2 THE COURT: Then the sentence I've described is the
3 sentence I impose. It's the sentence I find sufficient but not
4 greater than necessary to serve the purposes of sentencing.

5 Mr. Cannella, you have the right to appeal your
6 conviction and sentence except to the extent you've given up
7 those rights through your guilty plea or your plea agreement
8 with the government. If you think you have grounds to appeal
9 and are unable to pay for the costs of an appeal, you can apply
10 for permission to appeal without paying. Any notice of appeal
11 must be filed within 14 days of the entry of the judgment of
12 conviction and Mr. Ser will assist you with that.

13 Let me say before you go, I really feel like I'm
14 sticking my neck out here. Congress thinks you should get 87
15 to 108 months. I'm giving you about a quarter of that. I have
16 good reasons to do that. I have high hopes for you
17 straightening it out and going on to lead a law-abiding life
18 and getting the help you need not only to avoid getting in
19 trouble again but to be more content in your personal life.
20 But I'm sticking my neck out in doing that.

21 You're going to be on supervised release for seven
22 years after you get out. I hope you will regard the supervised
23 release not as more punishment but really a support that can be
24 helpful to you. If you find yourself tempted to go back to
25 drugs or other behaviors that are bad for you and you tell them

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1 they can actually help you and get you into a program. They
2 can get you support. They can help you find employers who are
3 willing to take somebody with a record, help you with school
4 and financial aid and stuff like that. I hope you don't regard
5 it as punishment. I hope you regard it as something that's
6 going to help keep you on the straight and narrow.

7 If you should screw up on supervised release, they're
8 going to bring you back before me. I have every expectation
9 that I'll still be here unless some misfortune befalls me. And
10 I'm going to look back in your file and I'm going to say wow, I
11 gave that guy a sentence not only way below his guidelines, but
12 way below his plea agreement, a plea agreement that already
13 represented a big break that the government gave him. And I'm
14 not going to be happy. And I'm not going to be inclined to be
15 generous again. But I hope that the fear of getting clobbered
16 by me should you violate supervised release will not even enter
17 your mind, because I hope you will be enough of a changed
18 person that you won't be inclined to violate any of your
19 conditions. And for the reasons your lawyer has articulated so
20 well, I think there are many reasons to believe that you're
21 going to be a success story in terms of bouncing back from
22 this. So I wish you the best of luck.

23 Any open counts or anything else?

24 MR. GRAFF: No your Honor.

25 MR. SER: Just one request. Would the Court recommend

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1 to the Bureau of Prisons housing as near as possible in this
2 district, as near as possible to this district given his family
3 ties to White Plains and the area?

4 THE COURT: Yes. I'll recommend a facility as near as
5 possible to SDNY. I don't know how much luck there will be
6 with that because this defendant has medical needs and they may
7 also want to put him in a sex offender program.

8 MR. SER: Would the Court consider a second
9 recommendation just in case? Would the Court consider Fort
10 Devens in Massachusetts?

11 THE COURT: That's probably where they'll send him
12 anyway. I don't like to say a specific facility. I think
13 there's a SOMP program there but I don't like to micromanage
14 them if I don't have to.

15 All right, anything else?

16 MR. SER: No, your Honor, thank you.

17 MR. GRAFF: No, Judge.

18 THE COURT: We are adjourned.

19 (Record closed)
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